Supreme Court, U.S.
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No. 03-580

In the Supreme Court of the United States

RUTH PYLES, TRUSTEE OF THE CLARENCE AND RUTH PYLES TRUST
Petitioners,

v.

COUNTY OF CLARK, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The first question to be determined is whether the opinion by the Nevada Supreme Court is sufficiently final for the exercise of this court's jurisdiction. If the court finds there is jurisdiction, the question would be whether the Undivided Fee Rule is in violation of the Fifth Amendment to the United States Constitution which requires the awarding of just compensation in eminent domain cases.

PARTIES TO THE PROCEEDINGS

The Petitioner in this case is a family trust which owns real estate in Las Vegas, Nevada. The Respondent, County of Clark, is a county and political subdivision in the State of Nevada which filed a complaint in eminent domain to condemn real estate owned by the Petitioners for expansion of jail capacity in Las Vegas, Nevada.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATEMENT OF CASE 2

REASONS FOR DENYING THE PETITION 4

1 The State Court judgment in this case is not final and therefore this court lacks jurisdiction to grant the petition 4

2. The Undivided Fee Rule does not violate any federal constitutional provision 7

3. Misstatements of Fact 22

4. Safety Valve 24

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Boston Chamber of Commerce v. Boston, 217 U.S. 189, 30 S.Ct. 459 (1910) 5

Burkhart v. United States, 227 F.2d 659 (9th Cir. 1955) 21

Carlock v. United States, 53 F.2d 926 (1931) 20

Cox Broadcasting v. Cohn, 420 U.S. 469, 95 S.Ct. 1029 (1975) 1, 6

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156, 94 S.Ct. 407 (1973) . . 1, 6

Silberman v. United States, 131 F.2d 715 (1942) . . 20

United States v. 1.377 Acres of Land in the City of San Diego, ___ F.3d ___, 2003 W.L. 22961693 (Dec. 2003) 21, 22

United States v. 131.68 Acres of Land, 695 F.2d 872 (1983) 20

STATE CASES

Benjamin Edmands v. City of Boston, 108 Mass. 535, 1871 W.L. 8864 (1871) 18, 19, 20

Bowers v. Fulton County, 146 S.E.2d 884 (Ga. 1966) 15

Chouinard v. City of Eastpoint, 237 Ga.App. 7, 514 S.E.2d 220 (1999) 16

Costa Mesa v. Security National Bank, 254 Cal.App.2d 4, 62 Cal.Rptr. 113 (1967) 12

TABLE OF AUTHORITIES—Continued

Page(s)

County of Clark v. Sun State Properties, 72 P.3d 954 (2003) 1, 5, 17, 18, 22-25

County of Los Angeles v. American Savings and Loan, 26 Cal.App.3d 7, 102 Cal.Rptr. 439 (1972) 10-13, 26

Eikelberger v. State, 83 Nev. 306, 429 P.2d 555 (1967) 24-25

Fulton County v. Funk, 266 Ga. 64, 463 S.E.2d 883 (1995) 15

Gifford v. Colorado Springs, 815 P.2d 1008 (Colo. App. 1991) 14

Montgomery Wards v. City of Sterling, 523 P.2d 465 (Colo. 1974) 8

New Haven School District v. Taco Bell, 24 Cal.App.4th 1473, 30 Cal.Rptr.2d 469 (1994) . . 13

People v. Amsden Court, 33 Cal.App.3d 83, 109 Cal.Rptr. 1 (1973) 11

People v. Lynbar Inc., 253 Cal.App.2d 870, 62 Cal.Rptr. 320 (1967) 9-12, 14, 25

Schwartz v. State, 111 Nev. 998, 900 P.2d 939 (1995) 25

State Highway Department v. Thomas, 154 S.E.2d 812 (Ga. App. 1967) 14

State v. Linnecke, 86 Nev. 257, 468 P.2d (1970) . . 25

State v. Shadduck, 75 Nev. 392 (1959) 9-12

Tacchino v. State, 89 Nev. 150 (1973) 12

The City of Manhattan v. Kent, 618 P.2d 1180 (Kan. 1980) 7

Urban Renewal Agency v. Wieder's Inc., 632 P.2d 1334 (Ore. App. 1981) cert. denied 644 P.2d 1127 (1981) 8

Vivian v. Board of Trustees, 152 Colo. 556, 383 P.2d 801 (Colo. 1963) 21

Washington v. Farmers Union Grain Co., 908 P.2d 386 (Wa. Ct. App. 1996) 22

White v. Fulton County, 444 S.E.2d 734 (Ga. 1994) 16

FEDERAL STATUTES

28 U.S.C. 1257 1

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully requests that this Court deny the petition seeking review of the opinion issued by the Nevada Supreme Court in this case.

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OPINIONS BELOW

The opinion of the Nevada Supreme Court was issued July 21, 2003. Rehearing was denied August 29, 2003. The case is reported at 72 P.3d 954. The trial court opinion is unreported.

♦

STATEMENT OF JURISDICTION

The Petitioners claim jurisdiction under 28 U.S.C. 1257 (a). However, the Nevada Supreme Court remanded the case to the state trial court for further proceedings. As is more fully set forth in the reasons for denying the petition section of this brief, the state court decision lacks the finality required by this court to grant a writ of certiorari. Cox Broadcasting v. Cohn, 420 U.S. 469, 95 S.Ct. 1029 (1975), North Dakota State Board of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156, 94 S.Ct. 407 (1973). Under this court's previous rulings, a decision by a state Supreme Court on an eminent domain case is only final when the state court has issued a judgment that is final on both the question of the taking and also on the amount of compensation. In our case, the landowners recently filed a motion with the state trial court for a jury trial on the issue of damages. The state court

recently granted that motion. The jury trial will probably not take place for several months.

♦

STATEMENT OF CASE

The County filed a complaint in condemnation to acquire two parcels of land in downtown Las Vegas to build a jail facility. The Complaint named as defendants, Sun State Properties, which owns one of the parcels being taken and, under a long-term ground lease, possesses and operates the apartments located on the second parcel. The County also named the Pyles Trust which owns the second parcel which was leased to Sun State Properties. Also named as defendants were several lenders who had deeds of trust or mortgages on the property. In July 1995, the District Court awarded occupancy of the property to the County and the County posted a cash bond with the Court. The cash bond was withdrawn by the defendants, the lenders were paid from the bond money and were released from the case. In November 1999, the State District Court held a two-day bench trial. Prior to the trial, the County filed a motion regarding NRS 37.115 asking the Court to value the property taken using the "undivided fee" rule whereby the property would be valued under the statutory definitions of fair market value and then, in a second proceeding, have the Court determine which portion of the compensation would be received by the landlords and how much would be received by the tenant. The Court deferred its decision on the motion until the trial. The Court took the matter under submission and later entered its decision. The Court decided not to use the undivided fee rule and valued all of the interests of the parties separately. On the parcel which is owned by the Pyles Trust and leased by Sun state Properties, the Court decided to give the lessee

the full value of its leasehold interest because the lease that encumbered the Pyles property provided for rent that was well below market rent and therefore had bonus value for the tenant. However, the Court also awarded the full value of the property to the owners of the property as if the land were not encumbered by the below market lease. The County appealed the Court's decision in this case to the Nevada Supreme Court. The Nevada Supreme Court reversed the trial court. The court ruled that the eminent domain rule known as the Undivided Fee Rule was adopted by the legislature by statute, NRS 37.115. The State Supreme Court also ruled that a property owner in a condemnation case may collect lost profits that would have been earned on the property following the filing of the eminent domain complaint if the property owner can show that the government caused an unreasonable delay in bringing the action to trial if the government purposely and in bad faith pursued an unconscionable dilatory course of action during litigation. It is unlikely that the property owners could show such conduct since none existed but that issue will have to be determined by the trial court also. As a result, the present posture of the case is that the parties must litigate in State District Court the issues of what compensation is due to the owner for the taking of the property and whether the property owners are entitled to receive additional compensation for loss of profits during the condemnation case.

REASONS FOR DENYING THE PETITION

1. The State Court judgment in this case is not final and therefore this court lacks jurisdiction to grant the petition.

The Petitioners in this case, Ruth Pyles and the Ruth Pyles Trust are the owners of one of the parcels of land taken in this case. The parcel was encumbered by a long term lease which had approximately eighteen (18) years remaining on it at the time of the taking. They leased the property approximately twenty (20) years earlier. The lessee of the property built apartment houses on the land. However, the lease was strictly a ground lease and the Petitioners were entitled to receive only five hundred dollars per month rent on the entire property for the remainder of the lease. There were no clauses for rent escalations or cost of living increases. The four appraisers who appraised the Petitioner's property gave expert opinions that the fair market value of the property was worth between $984,000.00 and 1,148,000.00. The two appraisers who valued the lessee's interest and the owner's reversion interest as they existed at the time of taking valued the Petitioner's remainder ownership interest in the parcel at $251,000.00 to $263,000.00. One of the appraisers hired by the Petitioners did not value the individual interest as they existed. Instead, he gave his opinion as to the full market value of the property which he pegged at $1,030,000.00. He then came up with the opinion that since the condemnation extinguishes the lease, the Petitioners should not be compensated for their interest in the land as it existed at the time of the taking but should rather receive the full market value of the property as if not encumbered by the bad lease.

The trial court decided to value the interest of the lessee as if there were eighteen years left on the lease but when awarding compensation to the property owner, decided to value the owner's interest as if no lease existed. As a result, a property that was worth at the most $1,148,000.00 resulted in the County paying over $2,000,000.00 since the lessee would receive the full value of its leasehold interest and the owners received full market value of the property as if there were no leasehold interest. Upon realizing this, the Nevada Supreme Court stated:

> Thus, the District Court's just compensation resulted in an award more than what Sun State and the Pyles lost. 72 P.3d 954, 960.

The Nevada court cited this court's opinion in Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195, 30 S.Ct. 459 (1910). Noting that this court ruled that the compensation paid for condemned property should place the property owner in as good a position as he was before the taking.

The Nevada Supreme Court went on to reverse the district court decision and remanded the case for a new trial.

Under a Nevada statute, NRS 37.160, the title to Petitioner's property will not vest in the County until a final order of condemnation is issued by the court and is recorded with the County Recorder. The final order of condemnation will not be issued by the court until the matter of compensation is finally determined. As a result, there is no final judgment awarding title to the property to the County nor is there a final judgment determining what amount of compensation will eventually be awarded to the Petitioners. This court has ruled that a petition for certiorari cannot be

granted unless the state court decision is final as to the federal questions involved. The court has also ruled that in eminent domain proceedings, a state court judgment is not final unless the state court action has embraced not only a final judgment regarding the taking of the land but also the amount of compensation that is awarded to the property owner as a result of losing his title to the property.

In the case of Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 95 S.Ct. 1029 (1975), this court stated:

> Eminent domain proceedings are of the type that may involve an interlocutory decision as to a federal question with another federal question to be decided later. For in those cases the federal constitutional question embraces not only a taking but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem. (Citing North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 163, 94 S.Ct. 407, 412). 420 U.S. 469, 477, 95 S.Ct. 1029, 1037, footnote 6.

In our case, we do not have a final order of condemnation that would finally vest the title in the County nor do we have a final order regarding the amount of just compensation to be paid for the taking. As a result, this does not fit into the four categories discussed in Cox Broadcasting which would allow this court to hear a case that is not final. Since this case lacks sufficient finality under this court's previous rulings, the Petition for Certiorari should be denied.

2. The Undivided Fee Rule does not violate any federal constitutional provision.

Most of the eminent domain provisions in Nevada are set forth in Chapter 37 of the Nevada Revised Statutes. NRS 37.115 provides:

> where there are two or more estates or divided interests in property sought to be condemned, the plaintiff is entitled to have the amount of the award for such property first determined as between plaintiff and all defendants claiming any interest therein. The respective rights of such defendants in and to such award shall be determined by the court, jury, or master in a later and separate hearing in the same proceeding and the amount apportioned by order accordingly.

The Nevada Supreme Court held that this statute is a codification of the undivided fee rule. The basic concept of the undivided fee rule is that when a government takes property that is subject to a lease or mortgage or other encumbrance, the property is first valued as if owned and occupied by the same person. When the fair market value is ascertained, that is the amount that the government has to pay. Then in a separate proceeding, the landlord, tenant and mortgagee are allowed to present evidence to determine what the values of their individual interests in the property are and the Court distributes the compensation to the parties according to the value of each interest.

In the case of The City of Manhattan v. Kent, 618 P.2d 1180 (Kan. 1980), the Kansas Supreme Court held that evidence of the value of a lease should be excluded during the initial valuation stage of the proceedings. The court should

first determine the fair market value of the entire property. The lessee and lessor could then put on evidence of the value of their individual interests during the apportionment stage of the proceedings. The Kansas Court went on to state that the rental payments from the lease could be considered during the initial valuation stage along with any other evidence that might indicate what a buyer would pay for the property. However, the value of the lessee's or lessor's interest in the property would not be admissible in the initial valuation stage of the proceedings. Allowing the rental payments to be considered during the valuation stage of the proceedings is in accord with the decision of the Nevada Supreme Court in State v. Shadduck, 75 Nev. 392 (1959), where the Nevada Supreme Court stated that evidence of rental payments could be admitted when determining the value of the property.

In the case of Urban Renewal Agency v. Wieder's Inc., 632 P.2d 1334 (Ore. App. 1981) cert. denied 644 P.2d 1127 (Ore. 1981), the Court ruled that the lessee could not put on evidence of the value of its leasehold interest during the valuation stage of the trial because the main issue at that stage is the fair market value of the property being taken. As in Nevada, the Court ruled that evidence of the existence of a lease is admissible during the valuation stage to show such things as the highest and best use of the property. However, the lease value to the lessee or lessor is not relevant at this stage of the proceedings and the Court ruled that the lease value should only be determined at the apportionment stage of the proceedings. 632 P.2d 1334, 1336.

Likewise, in the case of Montgomery Wards v. City of Sterling, 523 P.2d 465 (Colo. 1974), the court ruled that a lessee cannot put on evidence of the value of his leasehold interest during the valuation stage of the trial because the main issue at that stage of the trial is the fair market value of

the property. As in Nevada, the court ruled that the evidence of the existence of the lease or its income stream is admissible during the valuation stage but the value of the lessee's interest in the lease or the value of the landlord's reversion interest is not relevant at the first stage of the proceedings. Those values should only be determined at the second apportionment stage following the trial.

In ruling against the County in our case on this issue, the trial Court cited at length the case of People v. Lynbar Inc., (1967) 253 Cal. App. 2d 870, 62 Cal. Rptr. 320. The Court's reliance on this case was surprising because neither party cited the Lynbar case in any of its moving papers or briefs. The reason the County did not cite it was that later California cases have all explained away the language in the Lynbar case.

The District Judge cited Lynbar as allowing a separate valuation for each interest in the property instead of first ascertaining the fair market value of the property as a whole. However, that was not the holding in the Lynbar case. What the Lynbar case ruled was that evidence of the lease income was admissible to help determine what a buyer would pay for the property. The Court still had to determine the fair market value of the property as a whole. The discussion about valuing different interests was dicta since the tenant was not claiming a share of the award. All the Lynbar case ruled was that the existence of a beneficial lease was something that a buyer might consider when determining what to pay for the property. If the rental payments were above rents paid in the market, a buyer would likely pay a higher price for the property. If the lease payments were below market rents in the area, then the buyer would likely pay a lower price for the property. This holding is just like the holding in the case of State v. Shadduck, 75 Nev. 392 (1959) in which the Nevada

Court ruled that rental payments that are generated by the property should be admitted when trying to determine the fair market value of the property. 75 Nev. 392, 398. The Court in Shadduck ruled that when determining fair market value, a jury could consider any elements that an ordinary, prudent business person would consider when deciding what to pay for the property. However, the jury would still then have to reach the bottom line determination as to what the fair market value of the property is.

The District Court's finding in this case that the Lynbar case held that the leasehold interest should be valued separately during the first phase of the trial is not accepted by the California courts. The District Court in our case cited the California case of County of Los Angeles v. American Savings And Loan, 26 Cal. App.3d 7, 102 Cal. Rptr. 439 for the proposition that the Lynbar case acknowledges that a separate valuation of all of the interests can result in the total award being worth more than the fair market value of the property. However, in the American Savings and Loan case, the Court discussed the holding in Lynbar and the landlord's contention that the court should ignore the fact that Los Angeles County already had a long-term lease on the property. The Court stated:

> It is equally ridiculous to suppose that a buyer in the open market in light of the existence of the County's unexpired lease, would have paid American the same amount as the property would have brought if unencumbered by the lease. . . 102 Cal. Rptr. 439, 443; 26 Cal. App. 7, 12.

Therefore, even under the Lynbar reasoning, the Court should have recognized that a long-term lease encumbering the property would lower the value of the landlord's interest

in the property. The lease in the American Savings and Loan case only had about 8 years left to run. The lease in our case had over 18 years left to run which would magnify the lowering of value of the landlord's interest to potential purchasers. In that County of Los Angeles v. American Savings and Loan case, the Second Court of Appeals which was the court that previously decided Lynbar also stated:

> California statutes, as well as court decisions, appear to support both the undivided fee and the aggregate of interest rules. . . 102 Cal. Rptr. 439, 433; 26 Cal. App. 3d 7, 12.

Later California cases have explained the Lynbar holding for what it was. It simply held, as the Nevada court did in State v. Shadduck, that in the valuation stage, existing leases must be considered when determining what the value of the property is. In the case of People v. Amsden Court, 109 Cal. Rptr. 1; 33 Cal. App. 3d 83 (1973), the Court stated:

> . . . Lynbar simply holds that at the valuation stage, all existing leases must be considered as the condemnor must take the property in the condition in which it finds the property on the applicable date. . . 109 Cal. Rptr. 1, 4; 33 Cal. App. 3d 83, 88. (Emphasis added)

The Court in the Amsden case then went on to hold that the existence of a sublease in that case was properly admitted by the trial court during the valuation stage but the actual bonus value of the lease was to be determined at the separate apportionment stage of the trial. The Court stated:

> the trial court's ruling here was correct in any event as under Lynbar, for purposes of valuation, the price

> paid for the property is established by the existing lease. The existence of the sublease and the presence of any bonus value is left to the apportionment proceeding. . . 109 Cal. Rptr. 1, 5; 33 Cal. App. 3d 83, 89.

In our case, the County is not asserting that the Court cannot consider income from a lease during the value stage of the proceeding. In fact, the appraiser for the County looked at income of the property when doing research to determine the value of the property. Under Nevada law, the Court should allow any evidence that a reasonable prudent business person would consider when deciding what to pay for the property in question. This would include evidence of an advantageous lease or a disadvantageous lease on the property along with any other information that would be available to a buyer when determining what to pay for the property if it were put on the open market. State v. Shadduck, 75 Nev. 392 (1959); Tacchino v. State, 89 Nev. 150 (1973). These cases ruled that evidence is admissible if a reasonable business person would consider it when deciding what to pay for the property as a whole. However, the District Court still should follow the undivided fee rule, NRS 37.115, and first determine the value of the property as a whole and then, in a separate proceeding, determine what portion each interest holder receives from the award.

In the case of Costa Mesa v. Security National Bank, 62 Cal. Rptr. 113; 254 Cal. App. 2d 4 (1967), which was decided one week after the Lynbar case, the California Court held that the courts should value the property taken as if it were owned by a single person and then, in a later proceeding, apportion the award among the various interest holders. This is a statement of the classic undivided fee rule which might explain the court's statement in County of Los

Angeles v. American Savings and Loan, supra, when it noted that the California Courts supported both the undivided fee rule and the aggregate of interest rule. In more recent cases, the California courts have sorted out this jargon and have ruled that no matter what you call the California rule, the separate awards to the landlord and the tenant should still equal the fair market value of the property as a whole. In the case of New Haven School District v. Taco Bell, 30 Cal. Rptr. 2d 469; 24 Cal. App. 4th 1473 (1994), the California Court explained the current state of law in California as:

> whether or not the lessor and lessee are joined in a single proceeding, these rules will ordinarily result in an aggregate award to both lessor and lessee equal to the market value of the property. Where the lease rental falls below market value, the lessor will have a claim to less than the full market value of the property, since he is restricted to the present value of the actual contract rental; but the lessee will have the right to recover the balance of the market value, above that recovered by the lessor, as lease bonus value. . . 30 Cal. Rptr. 2d 469, 471-472.

Modern case law has held that the undivided fee rule should still be used when valuing divided fees in condemnation cases. The condemning authority should be required to pay the full fair market value of the property that it would bring if it were placed for sale on the open market. This valuation stage should include any good or bad features of the property including advantageous or disadvantageous leases, condition of buildings, existence of contamination and anything else a prudent buyer would consider when determining what to pay for the property. However, after paying the award for the value of the property, the government should have no further interest in how that award

is divided among the various interest holders. That portion of the litigation should be left to the owners, lessees, mortgagees, lienholders, etc. In the case of Gifford v. Colorado Springs, 815 P.2d 1008 (Colo. App. 1991) the owner of a restaurant sued the City claiming inverse condemnation because of the condemnation and construction of a roadway project which took part of a shopping center where the restaurant was located. The owner of the shopping center had already settled with the City so the tenant asked the Court to value its leasehold interest separately and grant an award for its leasehold separately from the award given to the owners. The Court stated:

> Under Colorado's undivided basis rule of fair market valuation, the condemnor must value the property as a whole by assuming ownership by one person while taking into consideration the value of encumbrances upon the fair market valuation of the property. . . when the value of the leasehold is considered in determining the reasonable market value of the property, a lessee is not entitled to establish the value of its leasehold interest independently of the value of the entire property, nor is he entitled to receive a separate award from the condemning authority for the value of the leasehold. . . once a fair market valuation has been established, the right to compensation is personal to the owner. . . and the apportionment of this amount among persons claiming a share is not a concern of the condemnor. . . 815 P.2d 1009, 1011.

Apparently the state of Georgia also had language in a case that caused the same confusion that Lynbar did in California. Some appellants cited the case of State Highway Department v. Thomas, 154 S.E.2d 812 (Ga. App. 1967) and

Bowers v. Fulton County, 146 S.E.2d 884 (Ga. 1966) for the proposition that Georgia law required a court to value all interests separately rather than following the undivided fee rule. However, the Georgia Supreme Court straightened out the confusion and simply held that this was not true. In the case of Fulton County v. Funk, 463 S.E.2d 883; 266 Ga. 64 (1995) the Georgia Supreme Court stated:

> Although Bowers expanded the elements of recoverable just and adequate compensation, it had no effect on the applicability of the "undivided fee rule". That rule applies only when the fair market value of a real property taken does, in fact, constitute just and adequate compensation in a particular case. Pursuant to the rule, the condemnor need only pay the value of the land that was taken, which is then to be divided among the claimants based upon their respective interests. . . Insofar as the valuation of the land taken is concerned, neither the lessor nor the lessee is harmed by the application of this rule in the usual case. Generally, a leasehold has value to the lessee only if he is paying below market rent and, to the extent that a fee is encumbered by a lease for below market rent, it is of a correspondingly lesser value to the lessor. . . Thus a single valuation of the undivided fee will represent the total amount of just and adequate compensation that must be paid for the real property taken and the lessee and lessor will be entitled to their respective shares thereof. Since the lessor owned and held the land subject to the interest therein of his lessee, he is not entitled to compensation for injury to the interest of the lessee. . . In that regard, the compensation to be paid is for the land that was taken and not for the different interests therein. Therefore, the duty of the condemnor to make payment is not

> affected by the nature of title or the diversity of interest in the property. Pursuant to this concept, known as the undivided fee rule, the condemnor need only pay the value of the land that was taken and this is divided among the claimants based upon their respective interests. . . there is no doubt in Georgia, each condemnee must be paid for what he has lost, not for what the condemnor has gained. However, in White, 444 S.E.2d 734, we mistakenly held that the undivided fee rule expresses a contrary principal. Rather than expressing a contrary principal, that rule merely insured that each condemnee will not be paid more than he has lost. Justice is no more done in the case of overpayment than in the case of underpayment. . . Under the rule, the fair market value of the property that was taken is generally the maximum amount that the condemnees can recover for their lost interests in the real property. This is true because when the value of the real property is being determined any "value" in the leasehold generally results in a corresponding loss in the "value" of the fee. The only exception is when the condemnees successfully assert that the property that was taken has a unique value ... 463 S.E.2d 883, 885; 266 Ga. 64, 65-66 (1995)

The property being taken in our case was not "unique." The Georgia courts define unique as a property that does not have a market value because such a property can not be bought or sold on the open market such as a railroad track. Chouinard v. City of Eastpoint, 514 S.E. 2d 220, 223; 237 Ga. App. 266, 268 (1999).

When asked to give an opinion of fair market value, the appraisers in our case were fairly close in their opinion of

what the total market value of the Pyle's property was worth. John Kiehlbauch valued the Pyle's parcel at $984,000. Mr. Rothenberg appraised the total market value of the Pyle's property at $1,030,000. Vern Cox valued the Pyle's property at a total of $1,050,000. Shelli Lowe appraised the Pyle's property at a total value of $1,148,000. By doing some quick math, it is plain to see that the County had to greatly overpay for the acquisition of the Pyle's property. The trial Court awarded Sunstate Properties a total of $1,868,000 for its interest in both the property it owned in fee and its leasehold interest in the Pyle's property. (72 P.3d 954, 956). Even if the trial Court gave the highest value given by the appraisers for the property that Sunstate owned in fee ($752,000 estimate by Shelli Lowe), then that means that Sunstate Properties was awarded $1,116,000 for its leasehold interest in the Pyle's property. Since the Court awarded $1,030,000 to the Pyles for its ownership interest in the property and $1,116,000 to the lessee for its leasehold interest in the Pyle's property, this means that the County paid over $2,000,000 for the Pyle's property which all of the appraisers agreed was worth between $984,000 and $1,148,000. The trial Court should have taken the fair market value of the property and subtracted from it the leasehold value of the lessee and given the rest to the lessor. Instead, the Court awarded a separate amount to the lessee for the lessee's interest and then valued the lessor's interest as if it were not encumbered by the lease. By stacking the individual interests of the lessors and lessees and not accounting for the simple fact that when a lessee has a long-term lease at a very low rent, his gain is the landlord's loss, the Court effectively doubled what the County had to pay for the property. If a lessee's interest in the property is worth over a million dollars because of an advantageous lease he has over the landlord, then the landlord's interest in the land would be so encumbered by that lease that the landlord's interest would be worth less than if he owned the property

free and clear. That is the whole basis of the undivided fee rule. It reflects what happens in the market in real life. Prospective buyers will not pay double for a property simply because there is a tenant involved. The Nevada Supreme Court was correct when it reversed the trial Court.

As was noted by the Nevada Supreme Court in its opinion in this case, the majority of the states apply the undivided fee rule. 72 P.3d 954, 958. There are reported cases from well over a century ago where courts have applied the undivided fee rule. In the case of Benjamin Edmands v. City of Boston, 108 Mass. 535, 1871 W.L. 8864 (1871), the Supreme Court of Massachusetts dealt with a Massachusetts statute that required the assessment of damages as if the owner were the only person interested in the land, and then, in a separate apportionment proceeding, decide what portion of the award each tenant and owner would receive. The court held that the Massachusetts statute which appears to be the undivided fee rule did not violate any essential right. The court held that under eminent domain theory, the government exercises the right of eminent domain against the land itself and it is valued as a whole regardless of how many interest holders there are. The court stated:

> . . . we think it clear that the rule must be precisely the same as if they were the only party interested in the damages. The statute, § 55, distinctly requires it to be so; and we do not see that any essential principal of right is violated thereby. The situation of the estate and the manner of its occupation are doubtless to be taken into consideration in estimating the injury caused by disturbing that occupation. But between the public and the landowner it is but one estate. The public right is exercised upon the land itself, without regard to subdivisions of interest by which the subject

> is affected through the various contracts of individual owners. The public cannot be expected to forego its right to take property for public uses because the exercise of that right will defeat private contracts, nor is it reasonable that losses arising from the failure of such contracts, which otherwise might furnish grounds of damage between the individual parties, should measure the compensation to be rendered for the property so taken. Such a rule would seriously impair the public right. A fair compensation for the property taken and injury done, ascertained by general rules, is a substitute to the owners for that of which they are deprived. That is the whole of the transaction with which the public is concerned. The apportionment is merely a setting out to the several owners of partial interests of their corresponding rights in the fund which has been substituted for the property taken. 108 Mass. 535, 544, 1871 W.L. 8864, P.6.

The basic undivided fee rule has not changed in this country since those early days. As stated in the quotation, the situation of the estate is to be considered when deciding what the government should pay. Therefore, the jury could consider during the valuation stage any favorable leases or income being produced on the property to determine what a buyer might pay for it. However, as between the public and property owner, the property is to be valued as if owned by one person. The Massachusetts court went on to rule that a question to one of the owners as to the amount of rent they were receiving on the property was properly allowed. 108 Mass. 535, 546, 1871 W.L. 8864, P.8. The court also ruled that the trial court rightly refused to allow the interest holders to present their claims in separate cases upon which separate judgments and verdicts could be rendered. 108 Mass. 535, 547, 1871 W.L. 8864, P.8.

There is an old saying that there is nothing new under the sun. That is apparently true with eminent domain cases. The owners in the Edmands case argued that the sum of the market value of all of the separate leases, valued separately, exceeded the value of the property as a whole. However, the court ruled that it does not follow that that is an unjust result as between the owners and the public and that as long as the court came to a fair conclusion in the apportionment stage of the proceedings that the statute could not be "impeached" on those grounds. 108 Mass. 535, 549-550, 1871 W.L. 8864, P.10.

Likewise, the undivided fee rule is not new the federal court system. In the case of Silberman v. United States, 131 F.2d 715 (1942), the First Circuit recognized in the case such as this that when there is a condemnation of property owned by one party and leased by another, the first stage of the proceedings is to determine the value of the property which is then paid by the government. The court held that the trial court has a discretion to exclude cumulative evidence on the question of value of the property as a whole which was sought to be introduced by a lessee since the question of the value of the property as a whole is the only important question for the jury to determine at the first stage of the trial. 131 F.2d 715, 717. The court also ruled that the value of the leasehold should not be introduced at the initial valuation stage as the value of the leasehold was not then an issue before the jury. On the issue of apportionment, the court cited the case of Carlock v. United States, 53 F.2d 926 (1931) for the proposition that the proper way to apportion the award between the owner and the lessee was to determine the value of the lessor's reversionary interest and subtract that from the amount awarded which would leave the amount to be distributed to the lessee. In the case of United States v. 131.68 Acres of Land, 695 F.2d 872 (1983), the Fifth Circuit

applied the undivided fee rule to a taking by the U.S. government and stated the applicable language of courts that follow the rule when it stated:

> . . . This common sense notion is expressed by the so - called "undivided fee rule," which provides that the division of a fee into separate interests cannot increase the amount of compensation that the condemnor has to pay for the taking of the fee. 695 F.2d 872, 875.

More recently, in the case of United States v. 1.377 Acres of Land in the City of San Diego, ___ F.3d ___, 2003 W.L. 22961693 (Dec. 2003), the Ninth Circuit Court of Appeals stated:

> It is well established that when the government exercises its power of eminent domain, it compensates the people who have possessory interests in the seized land under the so called "undivided fee rule". . . The "undivided fee rule" essentially operates by permitting the governmental authority to condemn property by providing just compensation, then allowing the respective interest holders to apportion the award among themselves, either by contract or judicial intervention. Burkhart v. United States, 227 F.2d 659, 662 (9th Cir. 1955). Usually, the courts treat the eminent domain proceeding for the division of proceeds as one of interpleader, where the government deposits the just compensation for the whole parcel and the landlord and tenant come in as claimants. Vivian v. Board of Trustees, 152 Colo. 556, 383 P.2d 801, 803 (Colo. 1963). Once the reasonable market value of the property subject to eminent domain proceedings has been established, the apportionment of that amount among persons claiming

> an interest therein is a matter of no concern to the condemnor. Once the government provides just compensation for the condemned property, its role is at an end, because condemnors do not, as a practice, apportion the awards among the various interests involved. Washington v. Farmers Union Grain Co., 908 P.2d 386, 389 (Was. Ct. App. 1996). Rather, the apportionment is left to either the discretion of the court or the allocation agreed upon by the parties in a contract. . . . ___ F.3d ___ 2003 W.L. 22961693, P.7.

The claim by the Petitioners that the undivided fee rule is not fair is simply a fallacy. As was noted by the Nevada Supreme Court in this case, when the trial court departed from the undivided fee rule, the County ended up paying over $2,000,000.00 for a parcel that was appraised by four different appraisers, the highest of whom came in with an opinion that the property was worth $1,148,000.00. "Thus, the district court's just compensation resulted in an award more than what Sun State and the Pyles lost." 72 P.3d 954, 960.

3. Misstatements of Fact.

Supreme Court Rule 15 provides that attorneys are to point out to the court any perceived misstatements of fact. It is presumed that the misstatements in the Petition were not intentional. In fact, the attorneys drafting the Petition were not involved in the state court proceedings and probably got the erroneous information from the trial court judge's findings which were in error.

The first misstatement of fact is at page 4 of the Petition. The Petitioners state that Clark County valued the leasee's

leasehold interest at zero. They also state that the Petitioners introduced evidence that the leasehold had a value beyond the valuation of the fee simple value which was not contradicted by any evidence produced by the County. These statements simply are not true. The County introduced two separate appraisals. One was originally hired by the County and the other was originally hired by the Petitioners. Contrary to the statement in the Petition, the appraisal of Verne Cox which was submitted by the County as an exhibit valued the entire property at a market value of $1,050,000. It also valued the leasehold value at $799,000 and valued the owner's reversionary interest at $251,000. The error by the trial court in not knowing that the County introduced such evidence was corrected by the state supreme court. The appraisal figures of Mr. Cox were set out in the state supreme court opinion at 72 P.3d 954, 956.

At page 5 of the Petition, the Petitioner states that an appraiser by the name of Mr. Rothenberg determined that the value of the leasehold interest was $1,000,000 and that the value of the fee subject to leasehold plus the value of the reversion brought back to present value was $1,030,000. However, that figure was not the value of the fee subject to the leasehold. It was the value of the fee as if not subject to the leasehold. What Mr. Rothenberg did was value the lessee's interest in the lease at a very high value because the lease rental payments were so far below market value that the tenant had a substantial bonus value. However, he then valued the owner's interest in the property as if it were not encumbered by the unfavorable lease.

At page 21 of the Petition, the Petitioner states that Mr. Rothenberg was the only expert to assess the value of the Pyles' interest. Again, this is simply not true. Appraiser Shelli Lowe, appraised the Pyles' interest. Shelli Lowe

assessed the value of the Pyles' interest at $263,000.00. As stated previously, Vern Cox also assessed the value of the Pyles' interest along with the leasehold interest. He assessed the value of the Pyles' interest at $251,000.00. Again, this error by the trial court was pointed out to the State Supreme Court and the State Supreme Court included these figures in its opinion at 72 P.3d 954, 956.

4. "Safety Valve.

The Petitioners for the first time raise the allegation that the Nevada eminent domain law does not have a "safety valve" and therefore it is unconstitutional. Had the Petitioners raised the "safety valve" issue in the Nevada Supreme Court, the court probably would have discussed this issue in its opinion. The undivided fee rule will not cause anyone to get less than they are constitutionally entitled to get and the Nevada court has set forth its valuation standards in this case and in many others.

Under the undivided fee rule, the value of the property is determined as if there were one owner in the property selling it on an open market. However, if there are any features that would increase the value of the property, those features are allowed to be introduced in the valuation stage. For instance, in the case of State v. Shaddock, 75 Nev. 392, 344 P.2d 191 (1959), the Nevada Supreme Court allowed a property owner to introduce testimony about how much you would have to spend to buy a property that would generate the same income as the subject property. The court ruled that a property owner can introduce any evidence that a prudent business person would consider in determining what price to pay for a property. A later Nevada Supreme Court opinion added some foundational restrictions before a court would allow such testimony. Eikelberger v. State, 83 Nev. 306, 429 P.2d 555

(1967). However, the State Supreme Court has continually reaffirmed its "safety valve" type of reasoning in later cases. In its opinion in this case, the Nevada Supreme Court quotes the statute which provides for the ascertainment and assessment of damages payable to condemnees, NRS 37.110. The court went on to state:

> Additionally, this court has provided, "the determination of market value includes the consideration of any elements that fairly enter into the question of value which a reasonable businessman would consider when purchasing." 72 P.3d 954, 958.

The Court cited Schwartz v. State, 111 Nev. 998, 900 P.2d 939 (1995) and State v. Linnecke, 86 Nev. 257, 468 P.2d (1970). These cases state that the parties can introduce any evidence which a prudent business person would consider in determining what price to pay for a property. As a result, if there are any factors that would increase the fair market value of the property, including a favorable lease, then that fact would be admissible at the valuation stage of the proceeding. As stated previously, that is the gist of the California Intermediate Court of Appeals opinion in the case of People v. Lynbar, 253 Cal. App. 870, 62 Cal.Rptr. 320 (1967). All the Lynbar court ruled was that since there was a very high rent being generated by the lease on the property, the owner should be allowed to introduce the evidence of that rent at the valuation stage of the proceedings. Such evidence would be admissible at the valuation stage under the Nevada Supreme Court's opinion in this case and in its previous opinions. As a result, Nevada is on the same footing as any of the federal courts and the majority of the state courts that apply the undivided fee rule. At the valuation stage, the property owners can introduce evidence of rental payments, other income on the property, the useful life of the existing

buildings, amount of foot traffic going by the property, oil and mineral reserves, etc. If the property truly is worth more, the owners can introduce evidence to prove it. However, that is not what happened in this case. The owners got the district court to engage in a fiction. When valuing the lessee's interest, the court looked at the property as it actually sat and as it was encumbered on the date of value. However, when the court was valuing the owner's reversion interest, it valued it as if it were not encumbered by an unfavorable lease. Both of the appraisers that appraised the value of the owner's reversion interest as it really existed encumbered by the lease, valued it at between $251,000.00 and $263,000.00. Valuing it as if not encumbered by the lease resulted in a payment of over $1,000,000.00 to the owners. However, since the property was encumbered by an unfavorable lease, the owner's interest in the property was not as valuable as it would have been if the property were completely unencumbered. As stated previously, whether you apply the undivided fee rule or not, courts have held that it is ridiculous to suppose that a buyer would pay as much in the open market for a property that is encumbered by a bad lease as it would for a property that was unencumbered. County of Los Angeles v. American Savings and Loan, 26 Cal. App.3d 7, 12, 102 Cal.Rptr. 439, 443 (1972).

In the end, the court should value an owner's interest in leased property the same way appraisers Shelli Lowe and Vern Cox did in our case when they valued the reversion interest of the owner. The question to be answered is what did the owners loose? In this case, the owners lost property on which they would have made only $500 per month for another 18 years and they lost the value of the return of the property 18 years in the future. Both Sheli Lowe and Vern Cox did a valuation of the income stream and brought it to net present value. They then took the value of the property and

discounted for not having possession of it for another 18 years and added that to the amount of the value of the income stream. One came up with a value of $251,000.00. The other came up with a value of $263,000.00. This is the amount that the owners could use to put away in a passive investment and draw down $6,000.00 per year as they were getting from the property and at the end of 18 years have an amount equal to the value of the property. By awarding the owners over $1,000,000.00, the court gave them an amount that they could invest and earn $50,000.00 to $100,000.00 per year and at the end of 18 years still have over $1,000,000.00. Obviously, they were paid way more than what they lost.

CONCLUSION

The State Court case does not have the finality required for the granting of a writ of certiorari. Even if the court had jurisdiction to grant the petition, it should still be denied since the undivided fee rule is not unconstitutional. The rule, as applied by the Nevada Courts, awards just compensation. Before the taking in this case, the fee holder and the long term tenant shared the ownership of a property worth about $1,000,000. By ignoring the undivided fee rule, the trial court awarded the fee owners and the tenant about $1,000,000 each. Obviously that result is wrong. Since they shared ownership of a building worth $1,000,000, they should share an award of $1,000,000. That is what the undivided fee rule provides.

Respectfully submitted:

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